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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MORALES,

Defendant and Appellant.

B297638

(Los Angeles County
Super. Ct. No. BA204828)

APPEAL from an order of the Superior Court of
Los Angeles County, Robert J. Perry, Judge. Affirmed.

Richard Miggins, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,
Chief Assistant Attorney General, Susan Sullivan Pithey, Acting
Assistant Attorney General, Idan Ivri and Charles S. Lee, Deputy
Attorneys General, for Plaintiff and Respondent.

Jose Morales appeals from an order denying his petition for resentencing under Penal Code section 1170.95.¹ Because the court properly concluded that Morales is not eligible for relief under that statute, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Morales of two counts of first degree murder and one count of robbery, among other crimes. The jury also found true the special circumstance under section 190.2, subdivision (d), that the murders occurred during the commission of a robbery, that Morales was a “major participant in the robbery,” and that he “acted with reckless indifference to human life.” (*People v. Morales* (June 28, 2005, B175482) [nonpub. opn.]; see § 190.2, subs. (a)(17) & (d).) The jury made these finding under a beyond the reasonable doubt standard. (*People v. Morales, supra*, B175482; see § 190.4, subd. (a) [special circumstance finding requires proof beyond a reasonable doubt]; *People v. Clair* (1992) 2 Cal.4th 629, 663 [same].) On his direct appeal, Morales challenged the sufficiency of the evidence supporting these findings. This court rejected his arguments and held that the findings were supported by substantial evidence. (*People v. Morales, supra*, B175482.)

In 2016 Morales filed in the superior court a petition for writ of habeas corpus in which he challenged the jury’s section 190.2, subdivision (d) special circumstance finding based upon then-recent judicial interpretation of that section. After receiving an informal response from the district attorney and a reply filed by Morales, the court denied the petition, concluding

¹ Subsequent statutory references are to the Penal Code.

that “[t]he jury’s finding that [he] was a major participant in the robbery-murders was fully justified.”

On January 2, 2019, Morales filed in the superior court a petition for resentencing under Penal Code section 1170.95. Morales alleged: He was not the actual killer; he did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist that actual killer in the commission of the murder; and he “was not a major participant in the felony” or “did not act with reckless indifference to human life during the course of the crime or felony.”

On January 17, 2019, the court issued a minute order stating: “The court re-appoints the office of alternate public defender.” The court also directed the people to file a response to the petition.

On February 8, 2019, the People filed an opposition to Morales’s petition. Based on our opinion affirming his conviction and the superior court’s denial of Morales’s habeas petition, the People argued that “defendant is factually ineligible for relief under [s]ection 1170.95.” The People also argued that section 1170.95 was unconstitutional on various grounds. No one appeared, or filed a written reply, on behalf of Morales.

On March 11, 2019, the court issued an order denying the petition, stating: “The jury and the Court of Appeal agreed that Morales was a major participant in the murders in this case and that he acted with reckless disregard for life in committing those crimes. Morales is not eligible for resentencing under Penal Code

[sections] 1170.95 and 189[, subdivision] (e)(3).” The court further declared that section 1170.95 was unconstitutional.²

Morales filed a timely notice of appeal.

DISCUSSION

Morales contends that he alleged the facts required under section 1170.95, the “allegations stated a prima facie claim for re-sentencing,” and the court therefore erred in denying his petition. As we explain below, the court may consider the record of conviction in evaluating whether a petitioner has made a prima facie showing of eligibility under section 1170.95 and the record in this case establishes Morales’s ineligibility as a matter of law. We therefore reject Morales’s argument.

In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437), which, among other changes, amended section 189 to modify the felony-murder rule. As a result of the amendment, a “participant in the perpetration or attempted perpetration of” certain enumerated felonies, including robbery, “in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled,

² On appeal, the Attorney General agrees with Morales that section 1170.95 is constitutional and does not seek affirmance of the order on that ground. Because we affirm the order on the ground that Morales is not eligible for relief under the statute, we do not reach the constitutional issues. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230–231; *People v. Barasa* (2002) 103 Cal.App.4th 287, 292 & fn. 4.)

commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.” (§ 189, subd. (e).)³ The last of these is substantively identical to “the standard for finding a special circumstance under section 190.2[, subdivision] (d).” (*In re Taylor* (2019) 34 Cal.App.5th 543, 561; see also *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419 [where jury made findings under section 190.2, subdivision (d) that the defendant was a major participant in underlying felony and acted with reckless indifference for human life, it also made the “requisite findings necessary to sustain a felony-murder conviction under” Senate Bill No. 1437].)

Senate Bill No. 1437 also added section 1170.95, which permits a person convicted of murder under a felony murder theory or the natural and probable consequences doctrine to petition the court to have the murder conviction vacated and to

³ Subdivision (d) of section 190.2 sets forth a special circumstance that necessitates the penalty of death or imprisonment for life without the possibility of parole for “every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, . . . if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under [s]ection 190.4.”

be resentenced. (§ 1170.95, subds. (a) & (e); Stats. 2018, ch. 1015, § 4, pp. 6675–6677). To be eligible for relief under the statute, subdivision (a) of the statute sets forth three conditions that must be met: (1) A charging document was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) The petitioner was convicted of first or second degree murder following a trial or an accepted plea; and (3) The petitioner could “not be convicted of first or second degree murder because of changes to [s]ection[s] 188 or 189” made by Senate Bill No. 1437. (§ 1170.95, subd. (a).)

Reading section 1170.95 and section 189 together, one who was previously convicted of murder under a felony murder theory but was not a major participant in the underlying felony or did not act with reckless indifference to human life would be eligible for relief under section 1170.95. Conversely, one who was previously convicted of murder under a felony murder theory and was a major participant in the underlying felony and acted with reckless indifference to human life is not eligible for relief. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 330 (*Verdugo*) [“petitioner is ineligible for relief as a matter of law [if] he or she was convicted on a ground that remains valid notwithstanding Senate Bill [No.] 1437’s amendments to sections 188 and 189”].)

A petition under section 1170.95 must include a declaration stating that he or she is eligible for relief based on the conditions described in subdivision (a). (§ 1170.95, subd. (b)(1)(A).) The petition must also state the superior court case number and year of conviction, and whether the petitioner requests counsel. (§ 1170.95, subd. (b)(1)(B) & (C).) If these requirements are satisfied, the court must then “review the petition and determine

if the petitioner has made a prima facie showing that the petitioner falls within the provisions of [the statute].”

(§ 1170.95, subd. (c).) “The court’s role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner.” (*Verdugo, supra*, 44 Cal.App.5th at p. 329.)

In making this determination, the court may consider the record of the petitioner’s conviction, including documents in the court’s own file and the Court of Appeal’s opinion resolving the defendant’s direct appeal. (*Verdugo, supra*, 44 Cal.App.5th at pp. 329–330; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1138 (*Lewis*).) If, based on a review of such documents, the court determines that the petitioner is ineligible for relief under the statute as a matter of law, the court may deny the petition. (*Id.* at pp. 1138–1139.)

If, however, the court cannot determine that the petitioner is ineligible as a matter of law, the court shall appoint counsel for the petitioner, if requested (*Lewis, supra*, 43 Cal.App.5th at p. 1140), and “direct the prosecutor to file a response to the petition” to which the petitioner may reply. (*Verdugo, supra*, 44 Cal.App.5th at p. 330.) “If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause” (§ 1170.95, subd. (c)) and “hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner.” (§ 1170.95, subd. (d).)

Here, Morales, who was previously convicted under a felony murder theory based on an underlying robbery felony, is not eligible for relief under section 1170.95 if he was a major participant in the underlying felony and acted with reckless

indifference to human life. As discussed in our previous opinion addressing Morales's direct appeal, the jury that convicted Morales found these facts beyond a reasonable doubt and this court upheld the findings on appeal. He is therefore ineligible for relief under section 1170.95 as a matter of law. (Cf. *Lewis, supra*, 43 Cal.App.5th at pp. 1138–1140 & fn. 10.) The trial court, therefore, did not err in denying Morales's petition.

DISPOSITION

The order denying Morales's petition for resentencing is affirmed.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.